Supreme Court, U.S.
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No. 04-__

IN THE

Supreme Court of the United States

Terry L. Whitman,

Petitioner,

v.

U.S. Department of Transportation; Norman Y. Mineta, U.S. Secretary of Transportation.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Pamela S. Karlan
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
Goldstein & Howe, P.C.
4607 Asbury Place, N.W.
Washington, DC 20016
(202) 237-7543

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QUESTIONS PRESENTED

1. Whether 5 U.S.C. 7121(a)'s provision that the negotiated grievance procedures of a federal collective bargaining agreement be "the exclusive *administrative* procedures" to resolve grievances precludes an employee from seeking direct *judicial* redress when he would otherwise have an independent basis for judicial review of his claims.

2. Whether the Civil Service Reform Act, 5 U.S.C. 7101 *et seq.*, precludes federal courts from granting equitable relief for constitutional claims brought by federal employees against their employer.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Terry Whitman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-11a) is published at 382 F.3d 938. The district court's memorandum granting respondent's motion to dismiss (Pet. App. 12a-15a), dated February 26, 2003, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2004. The court of appeals denied rehearing and rehearing en banc on November 24, 2004. See Pet. App. 16a. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

5 U.S.C. 7121(a) provides:

(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

49 U.S.C. 45104 provides, in relevant part:

In carrying out section 45102 of this title, the Administrator of the Federal Aviation Administration shall develop requirements that –

* * *

(8) ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no

employee is harassed by being treated differently from other employees in similar circumstances.

STATEMENT

Petitioner alleges that the Federal Aviation Administration ("FAA") violated 49 U.S.C. 45104(8) and his constitutional right to privacy by failing to establish randomized drug testing procedures and subjecting him to drug tests at a rate far exceeding that of similarly situated co-workers. The district court dismissed the suit for lack of subject matter jurisdiction, reasoning that the Civil Service Reform Act ("CSRA") required him to grieve his allegations according to the procedures outlined in his Collective Bargaining Agreement ("CBA"). Expressly rejecting contrary holdings of the Federal and Eleventh Circuits, the Ninth Circuit affirmed, holding that petitioner's action was precluded because the CSRA "does not expressly confer jurisdiction" over claims subject to a CBA's negotiated grievance procedures.

1. The Civil Service Reform Act, 5 U.S.C. 7101 et seq., establishes a general system of administrative procedures for addressing federal employee grievances.[1] Section 7121(a)(1) requires that federal employee CBAs "shall provide procedures for the settlement of grievances" and that (subject to certain exceptions not relevant here) "the procedures shall be the exclusive administrative procedures for resolving grievances which fall with [the CBA's] coverage."

2. Petitioner Terry Whitman works as an Air Traffic Assistant for the FAA, an agency within the United States Department of Transportation ("DOT"), and is thus subject to

[1] Petitioner's employment is governed by the FAA Personnel Management System ("FAA System"). See Pet. App. 4a. The CSRA does not apply directly to the FAA System, but certain portions, including Section 7121(a), are made applicable to the FAA System by 49 U.S.C. 40122(g). *Ibid.*; see also FAA System, Ch. 5, § 1(a).

random drug and alcohol testing. See Pet. App. 2a. Believing that he had been selected for testing three times more often than other employees, petitioner filed a claim in June 2001 with the Federal Labor Relations Authority ("FLRA"). He alleged that the FAA's testing program "does not guarantee individual rights" and, moreover, that "the randomness of the selection process is suspect." *Id.* 3a. Finding that petitioner's claim did not fall within its jurisdiction because it did not involve protected union activity, the FLRA dismissed his claim and subsequently denied his appeal. See *id.* 13a.

3. In May 2002, petitioner filed this suit in the U.S. District Court for the District of Alaska. In his complaint, petitioner alleged that the FAA was testing him in a non-random manner in violation of his rights under 49 U.S.C. 5331(d)(8) (now codified at 49 U.S.C. 45104(8)). Between 1987 (when the testing was initiated) and 2000, for example, petitioner was tested eleven times, while two similarly situated employees were tested just once; most similarly situated employees were tested only four times. See Compl. 3. In an amended complaint, petitioner contended that the non-random testing procedures also violated his constitutional right to privacy. He sought injunctive relief in the form of a "survey of other employees to determine how often they were tested" and an order to "remedy the situation" if it was determined that petitioner was not being tested randomly. Pet. App. 3a.

Unless stripped of jurisdiction to hear the case by some other provision of law, the district court had jurisdiction over petitioner's claim under, *inter alia*, the Administrative Procedure Act and the federal court's inherent jurisdiction to enjoin unconstitutional conduct. The district court granted respondents' motion to dismiss, finding that it had no jurisdiction in light of the CSRA. Pet. App. 14a (citing *Veit* v. *Heckler*, 746 F.2d 508, 511 (CA9 1984)) (internal quotation marks omitted). The court held that it lacked jurisdiction not only over petitioner's statutory claim but also

over his constitutional claim, relying upon Ninth Circuit precedent holding that "the CSRA preempts *Bivens* actions *and* other suits for constitutional violations arising from governmental personnel actions." Pet. App. 14a & n.19 (citing *Russell* v. *United States Dep't of the Army*, 191 F.3d 1016, 1020 (CA9 1999)).

4. On appeal, the Ninth Circuit affirmed. It began by concluding that petitioner's claim falls within the meaning of "grievance" under the CSRA, 5 U.S.C. 7103(a)(9)(A); *id.* § 7103(a)(9)(C)(ii), and that he could have grieved his allegations pursuant to the CBA. Pet. App. 5a-6a.

The court of appeals determined that 5 U.S.C. 7121(a)(1) precluded petitioner from seeking direct judicial review of his claims. As an initial matter, it recognized that both the Federal Circuit, in *Mudge* v. *United States*, 308 F.3d 1220 (2002), and the Eleventh Circuit, in *Asociacion de Empleados del Area Canalera (ASEDAC)* v. *Panama Canal Commission*, 329 F.3d 1235 (2003), had held that, notwithstanding Section 7121(a)(1), a federal employee has the "right to seek a judicial remedy for employment grievances subject to the negotiated procedures contained in his or her CBA." Pet. App. 6a-7a (quoting *Mudge*, 308 F.3d at 1227) (internal quotation marks omitted). Those courts had rested their holdings on "[t]he plain language of § 7121(a)(1)," which had previously referred only to "exclusive procedures" but was amended in 1994 to provide that the negotiated grievance procedures "shall be the exclusive administrative procedures for resolving" covered grievances. The Federal and Eleventh Circuits found that text to be "unambiguous": "[t]he plain language of amended § 7121(a)(1) does not limit a federal employee's right to avail him or herself of alternative, non-administrative avenues of redress." *Mudge*, 308 F.3d at 1230; see also *ASEDAC*, 329 F.3d at 1240 (adopting Federal Circuit's reasoning in *Mudge*).

But the Ninth Circuit squarely rejected both the rationale and result of those cases, which it deemed "inconsistent with

the law of our circuit." Pet. App. 9a. Instead, it began by emphasizing that "[f]ederal courts 'have no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere.'" Pet. App. 7a (quoting *Veit*, 746 F.2d at 511). Relying on *Golt* v. *United States*, 186 F.3d 1158 (1999), in which the Ninth Circuit had construed the post-amendment version of Section 7121(a)(1) but had "never expressly addressed what effect, if any, the 1994 amendment" would have on the statute's meaning, Pet. App. 7a, the court of appeals concluded that "'under the law of this circuit, 5 U.S.C. § 7121(a)(1) *preempts* employment related claims which fall within collective bargaining agreements' because the statute does not expressly provide for federal court jurisdiction over such claims." *Ibid.* (quoting *Golt*, 186 F.3d at 1159) (emphasis added). "Because the addition of the word 'administrative' to the statute does not constitute an express grant of federal court jurisdiction," it continued, "*Golt* correctly held that amended § 7121(a)(1) establishes no more than an exclusive administrative remedy." *Id.* 8a. Further, although the court of appeals did not expressly ratify the district court's holding that "the CSRA preempts *Bivens* actions *and* other suits for constitutional violations arising from governmental personnel actions," *id.* 14a & n.19, it impliedly did so by favorably citing Ninth Circuit precedent that had so held, *id.* 9a (citing *Russell*, 191 F.3d at 1019-20). The court of appeals thus affirmed the district court's dismissal of petitioner's claim.

5. Petitioner timely sought rehearing and rehearing en banc. His petition was denied. Pet. App. 16a.

This petition followed.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Denial of Subject Matter Jurisdiction Over Federal Employees' Statutory Claims Conflicts With the Decisions of Other Circuits and Is Wrong on the Merits.

A. The Courts of Appeals Are Divided Over the Availability of a Judicial Remedy for Federal Employees' Statutory Claims.

Certiorari is warranted because the Ninth Circuit's construction of Section 7121(a) avowedly conflicts with the holding of two other circuits that the statute does not preclude a federal employee from bringing statutory claims directly in federal court. Indeed, the United States expressly acknowledged that a decision in its favor would create such a circuit split. See U.S. C.A. Br. 40 (entire section devoted to urging the court of appeals not to "Follow the Federal and Eleventh Circuits' Mistaken Rulings Concerning the Availability of Federal Court Review of Claims That Are Grievable Under the Civil Service Reform Act").

1. The Federal and Eleventh Circuits construe Section 7121(a)(1), as amended in 1994, to "limit the administrative resolution of a federal employee's grievances to the negotiated procedures set forth in his or her CBA," but not to "restrict an employee's right to seek a judicial remedy for such grievances." *Mudge*, 308 F.3d at 1228. The Federal Circuit in *Mudge* considered an FAA employee's claim for back pay. The Court of Federal Claims had dismissed the action, holding that Section 7121(a)(1) deprived it of jurisdiction. The Federal Circuit reversed, holding that Congress's addition of the word "administrative" to Section 7121(a) was a "change in the law that limited the scope of § 7121(a)(1)'s exclusivity provision," thereby removing the

bar to judicial review that had existed under the previous version of the statute. *Mudge*, 308 F.3d at 1224.[2]

The Federal Circuit carefully analyzed the meaning of each term in the text of Section 7121(a)(1). It concluded that its decision in *Carter* v. *Gibbs*, 909 F.2d 1452 (CAFC) (en banc), cert. denied, 498 U.S. 811 (1990), dismissing a federal employee's claim on the ground that Section 7121(a)(1) "limited the resolution of * * * grievances to the negotiated procedures set forth in an employee's CBA," *Mudge*, 308 F.3d at 1223, had been overturned by the 1994 amendment. The court reasoned that because the "common meaning" of "administrative" is distinct from "judicial," the phrase "exclusive administrative procedure" in Section 7121(a)(1) "limits the *administrative* resolution of a federal employee's grievances [but] does not restrict an employee's right to seek a *judicial* remedy for such grievance." See *Mudge*, 308 F.3d at 1228 (emphasis added).

Recognizing that the issue was "a contested matter with compelling and well-reasoned arguments on both sides," the Federal Circuit carefully considered – but ultimately rejected – each of the government's arguments that Section 7121(a) precluded judicial review. It first addressed the government's suggestion that the 1994 amendment merely clarified that – subject to certain exceptions not at issue in either *Mudge* or this case – an aggrieved employee's only remedy is the negotiated grievance procedures provided in her CBA. The court decided that the "subsection * * * mean[s] what it says" and that "administrative" means that the exclusion does not extend to judicial procedures. *Mudge*, 308 F.3d at 1228-29.

Next, the court considered the government's contention that the 1994 amendment left the substantive meaning of Section 7121(a)(1) unchanged, both because it was labeled a

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[2] The Federal Circuit subsequently reaffirmed *Mudge* in *O'Connor* v. *United States*, 308 F.3d 1233, 1239-40 (2002), and *Addison-Taylor* v. *United States*, 73 Fed. Appx. 418 (2003).

"Technical and Conforming Amendment" and because the legislative history does not reflect such an intent. The court dismissed those arguments based on what it regarded as the the plain text. See *id.* at 1229-30 (statute "does not provide two 'logical interpretations' * * * from which this court can choose").

The court then turned to the government's contention that the plaintiff's interpretation of Section 7121(a)(1) as preserving judicial remedies rendered superfluous Section 7121(a)(2), which provides that "any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement." That language, the government asserted, exists only to allow unions to preserve judicial remedies for certain types of grievances by excluding them from the CBA's grievance procedures. The court pointed out that Section 7121(a)(2) serves additional functions beyond preserving judicial review, namely "(1) foreclosing access to negotiated procedures; and (2) directing certain matters to alternative administrative channels." *Id.* at 1230-31.

Finally, the Federal Circuit rejected the government's argument that its reading would contradict the congressional preference for CBA grievance procedures and "disrupt[] the balance of procedural rights" set out in the CSRA. *Id.* at 1231-32. The court explained that such concerns could not work "to the exclusion of the plain language of the statute" and that, in any event, its ruling left the CBA procedure as the sole *administrative* procedure, reflecting precisely the "balance of procedural rights" Congress codified in the statute. *Ibid.*

The Eleventh Circuit subsequently adopted the Federal Circuit's reasoning and holding in toto in *Asociacion de Empleados del Area Canalera* (*ASEDAC*) v. *Panama Canal Commission*, 329 F.3d 1235 (2003), a case involving a group of Panama Canal Commission employees claiming back pay and other benefits. As in *Mudge* and this case, the district

court had dismissed the suit for lack of subject matter jurisdiction pursuant to Section 7121(a)(1), and the defendant Panama Canal Commission made arguments similar to those made by the government in *Mudge*. After reexamining the *Mudge* analysis point-by-point, the Eleventh Circuit "[found] the Federal Circuit's reasoning in *Mudge* on all these points to be persuasive and adopt[ed] that reasoning," *id.* at 1241, holding that a federal employee had the "right to bring his or her claims directly in federal court," *id.* at 1239.

2. In holding that Section 7121(a) deprives federal employees of the ability to seek judicial review of claims covered by negotiated grievance procedures, the decision below conflicts with both the holding and the reasoning of the Federal and Eleventh Circuits. While those circuits had rested their holdings on the fact that Section 7121(a)(1) does not expressly *exclude* judicial remedies, see, *e.g.*, *Mudge*, 308 F.3d at 1228, the Ninth Circuit took precisely the opposite approach, and rested its analysis on the fact that Section 7121(a) does not expressly *authorize* jurisdiction under the CSRA over claims such as petitioner's. See Pet. App. 9a-10a (citing *Golt* v. *United States*, 186 F.3d 1158, 1159 (CA9 1999)) (emphasis added). As a result, unlike the Federal and Eleventh Circuits, the Ninth Circuit treated the 1994 insertion of the word "administrative" into Section 7121(a) as having virtually no bearing on the question because "the addition of the word 'administrative' to the statute does not constitute an express grant of federal court jurisdiction." Pet. App. 8a. Thus, it continued to adhere to its own precedent interpreting the pre-amendment language. See *id.* 7a-8a (citing *Veit* v. *Heckler*, 746 F.2d 508, 511 (CA9 1984)).[3]

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[3] Relying on the same Ninth Circuit precedents, the Ninth Circuit in *Blue* v. *Widnall*, 162 F.3d 541 (1998), was able to dispose of a federal employee claim without once citing to Section 7121, the statute that the Federal Circuit spent fourteen pages analyzing in *Mudge*.

This circuit split will not resolve itself without the Court's intervention. The rulings of the courts of appeals are irreconcilable not only in their results but also their reasoning. There is no genuine prospect that any of the circuits will reverse itself, as *all three* have denied rehearing en banc. See Pet. App. 16a; *Mudge*, Order of Feb. 7, 2003; *ASEDAC*, Order of Aug. 19, 2003.

B. The Circuit Conflict Is Untenable Given the Disuniformities It Creates in Federal Personnel Law.

Certiorari is also warranted because the conflict, along both geographic and subject matter lines, is untenable. At year-end 2002, the federal government employed over 2.7 million civilians, of whom 722,931 worked in either the Ninth or the Eleventh Circuits. See OFFICE OF PERSONNEL MGT., *Table of Federal Civilian Employment Ranked by State with Trend Changes*, *available at* http://www.opm.gov/feddata/geograph/2002/index.asp. As the United States itself has acknowledged, the question whether judicial review is available for claims falling within the scope of the negotiated grievance procedures of a federal employee's CBA is one of "exceptional importance." See U.S. Pet. for Reh'g and Reh'g En Banc, *ASEDAC* v. *Panama Canal Comm'n*, at i (CA11 No. 02-13789-GG) (statement of counsel).

As a result of this circuit split, federal personnel law suffers from a lack of uniformity in two separate respects. First, government employees living in different parts of the country, including employees of the same agency, covered by the same Collective Bargaining Agreement, and subject to identical treatment have substantially different rights under federal labor law. Federal employees in the Eleventh Circuit may, like private-sector workers, sue their employer in federal court, while their co-workers in the Ninth Circuit are limited to the grievance procedures provided in their CBAs. Ninth Circuit workers are not merely subjected to a higher standard; they are subject to a categorical bar at the pleading stage,

making the Ninth Circuit rule outcome determinative in every case.

Second, the unique jurisdiction of the Federal Circuit[4] creates a schism between two types of relief. Because the Federal Circuit has appellate jurisdiction over all non-tort money claims against the United States, see 28 U.S.C. 1295(a)(2), (3); *id.* § 1346; *id.* § 1491, all claims relating to back pay will be governed by the Federal Circuit's interpretation of federal law, including the Federal Circuit's interpretation of Section 7121. By contrast, complaints seeking only injunctive relief are governed by the interpretation of federal law adopted by the regional circuit in which they are filed. And "mixed" cases, involving claims both under the Little Tucker Act, over which the Federal Circuit has exclusive appellate jurisdiction, 28 U.S.C. 1295(a)(2), and the Federal Tort Claims Act, *id.* § 1346(b), are reviewable only by the Federal Circuit. See *United States* v. *Hohri*, 482 U.S. 64, 75-76 (1987). Thus, the question whether federal courts have subject matter jurisdiction over cases such as petitioner's will be resolved differently depending on the relief the plaintiff seeks. In petitioner's case, because he is seeking only injunctive relief, the Ninth Circuit's parsimonious interpretation of Section 7121 means that his claim will be barred. No court has held that federal courts have broader jurisdiction over claims for money damages than over equitable claims,[5] yet that is the baffling consequence of the present law. Not only is this situation inequitable to federal employees, but it also complicates efforts by the federal government to establish uniform personnel practices.

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[4] See generally Robert G. Vaughn, *Federal Employment Decisions of the Federal Circuit*, 36 AM. U. L. REV. 825, 859 (1987) ("The [Federal Circuit] plays a very significant role in the development of federal employment law.").

[5] In fact, many courts have held exactly the opposite. See *infra* Part V.

C. Section 7121(a) Does Not Strip Federal Courts of Jurisdiction over Federal Statutory and Constitutional Claims.

Certiorari is also warranted because the decision below is wrong on the merits. As both the Federal Circuit and the Eleventh Circuit recognize, Section 7121(a) does not preclude a federal employee's direct recourse to the federal courts when there is an independent basis for federal jurisdiction, such as an alleged constitutional violation. The Ninth Circuit's contrary ruling cannot be reconciled with either the text of the statute or its legislative history, including particularly that provision's express limitation to "administrative procedure[s]."

"When the statute's language is plain, the sole function of the courts * * * is to enforce it according to its terms." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks and citations omitted). Thus, the inquiry must begin with the language of the statute itself. On its face, Section 7121(a) does not preclude a federal employee's direct recourse to the federal courts; to the contrary, it leads to the inescapable conclusion that such recourse *is* available. Subject to three exceptions not relevant here, the statute directs that the negotiated grievance procedures set forth in a federal employee's CBA are "the exclusive administrative procedures for resolving grievances that fall within [the CBA's] coverage." 5 U.S.C. 7121(a)(1) (2000).

Because Congress did not define the term "administrative," this Court will "give [the term] its ordinary meaning." *Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995). According to Black's Law Dictionary, "administrative functions or acts are distinguished from such as are judicial." BLACK'S LAW DICTIONARY 45 (6th ed. 1990). Further, this Court has repeatedly recognized the clear and mutually exclusive distinction between the terms "administrative" and "judicial." See, *e.g.*, *Georgia* v.

Ashcroft, 539 U.S. 461, 477 (2003) (noting the distinction between "administrative" and "judicial" preclearance processes in the Voting Rights Act context); *West* v. *Gibson*, 527 U.S. 212, 219 (1999) (explaining that the word "action" often connotes "judicial cases," not "administrative 'proceedings'"); *Hohn* v. *United States*, 524 U.S. 236, 237 (1998) ("[T]his Court may not review a federal judge's actions performed in an administrative, as opposed to a judicial, capacity * * *.") (citations omitted); *Gibson* v. *Berryhill*, 411 U.S. 564, 574 n.13 (1973) (noting the difference between state "judicial" and "administrative" exhaustion requirements).

Given this plain distinction between the terms "administrative" and "judicial," the court of appeals' holding is contrary to this Court's "settled rule that [courts] must, if possible, construe a statute to give every word some operative effect." *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 125 S. Ct. 577, 584 (2004). Construing Section 7121(a)(1) to preclude judicial remedies for federal employees covered by a CBA's negotiated grievance procedures effectively reads the term "administrative" out of the statute, impermissibly rendering that term "administrative" "superfluous, void, or insignificant," *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted)). By contrast, construing Section 7121(a) to preclude other administrative – but not judicial – remedies gives effect to each word in the statute and to Congress's intent to "limit[] the administrative resolution of a federal employee's grievances to the negotiated procedures set forth in his or her CBA" without "restrict[ing] an employee's right to seek a judicial remedy for such grievances." *Mudge*, 308 F.3d at 1228.

Despite the clarity of the statute's terms, the United States argued below that Congress could not have intended to authorize judicial recourse to federal employees "by implication and through technical and conforming amendments." U.S. C.A Br. 43. This argument is without

merit. Before Congress amended Section 7121(a)(1) in 1994, all of the courts of appeals that had addressed the issue – including the Federal Circuit in *Carter* v. *Gibbs*, 909 F.2d 1452 (1990) (en banc), cert. denied, 498 U.S. 811 (1990) – had held that the statute limited the resolution of grievances covered by the CSRA to the negotiated procedures in the federal employees' CBA. 909 F.2d at 1454. The 1994 amendment that added the word "administrative" strongly suggests that Congress did indeed intend to change federal employees' access to the court, for "Congress is presumed to be aware of an administrative or judicial interpretation of a statute," *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978), and there is a "common-sense presumption that statutes are usually enacted to change existing law," *Wallace* v. *Jaffree*, 472 U.S. 38, 59 n.48 (1985).

Because the statute's language is clear, "only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language." *Salinas* v. *United States*, 522 U.S. 52, 57 (1997) (alteration, internal quotations, and citations omitted). In this case, there is no legislative history to contradict the statute's plain meaning. In fact, the legislative history of the 1994 amendment to Section 7121(a)(1) only further undermines the court of appeals' holding.

When Congress amended Section 7121(a)(1) in 1994 to add the term "administrative," neither the House nor the Senate directly addressed the term's significance. Several aspects of the legislative history, however, clearly reflect Congress's understanding that inserting the term "administrative" into Section 7121(a)(1) would provide federal employees with direct access to the courts. First, during the subcommittee hearings on the version of the bill that was eventually passed, two officials from the National Treasury Employees Union urged Congress to overrule the Federal Circuit's decision in *Carter* v. *Gibbs* – which relied on the "unambiguous" language of Section 7121(a), see *Carter*, 909 F.2d at 1454 – and make clear that Section

7121(a) does not preclude federal employees covered by a negotiated CBA from bringing grievances covered by the CBA in federal court. See H.R. 2970, To Reauthorize the Office of Special Counsel and To Make Amendments to the Whistleblower Protection Act: Hearing Before the Subcomm. on the Civil Serv. of the Comm. on Post Office and Civil Serv., 103d Cong. 20-23 (1993) (statements of Timothy Hannapel, Assistant Counsel, National Treasury Employees Union, and Robert M. Tobias, President, National Treasury Employees Union). More important, a House committee report to H.R. 2721 – which was also proposed in 1994 but was ultimately unsuccessful – expressly indicated that the term "administrative" had been added to Section 7121(a) to make clear that "the grievance procedure was never intended to deprive employees of access to the courts," thus "correct[ing]" *Carter*. Federal Employees Fairness Act of 1994, H.R. Rep. No. 103-599, pt. 1, at 56 (1994), and that "section 7121 is not intended to limit judicial remedies otherwise provided by law." *Id.* pt. 2, at 75. The temporal proximity of this committee report to the passage of an identical amendment to Section 7121(a) strongly suggests that Congress understood the addition of the term "administrative" to the statute to overrule *Carter* and to allow employees recourse to the federal courts. Cf. *Public Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 460 (1989) (relying, in part, upon House Reports accompanying legislation that pre-dated the Act in question's passage, but which pertained to proposed legislation containing language similar to that in the final Act).[6]

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[6] The court of appeals relied upon 49 U.S.C. 40122(g)(2)(H) for the proposition that petitioner could file a prohibited personnel practice complaint with the Office of Special Counsel. Pet. App. 10a. The court failed to recognize that FAA is not covered by the prohibited personnel practice provisions of Title 5, with the exception of 5 U.S.C. 2302(b), "relating to whistleblowing." See 49 U.S.C. 40122(g)(2)(A). Thus, OSC has taken the position that it

II. This Court Should Also Grant Certiorari Because the Ninth Circuit's Refusal to Provide Equitable Relief Conflicts With the Holdings of Other Circuits and Is Wrong on the Merits.

A. The Circuits Are Also Divided Over Whether the CSRA Precludes Equitable Remedies for Constitutional Violations.

This Court should also grant review to resolve the split among the circuits over whether, when federal employees bring constitutional claims, the CSRA precludes equitable relief by courts or (more narrowly) precludes only *Bivens* actions for money damages.

In this case, the Ninth Circuit also disclaimed subject matter jurisdiction over petitioner's constitutional claims for equitable relief. It applied its longstanding, blanket prohibition of judicial review of any employment-related claim brought by a federal employee. See Pet. App. 8a-9a; see also *Saul* v. *United States*, 928 F.2d 829, 843 (CA9 1991) (holding that "judicial interference in federal employment is disfavored, whether the employee requests damages or equitable relief"). This holding is consistent with that of the Tenth Circuit. See *Lombardi* v. *Small Bus. Admin.*, 889 F.2d 959, 961-62 (1989).[7] Two circuits have held, to the contrary,

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only has jurisdiction over complaints by FAA employees that allege retaliation for whistleblowing. See http://www.osc.gov/ppp.htm#q2.

[7] Two circuits have backed away from earlier cases denying jurisdiction over equitable claims. See *Bryant* v. *Cheney*, 924 F.2d 525, 528 (CA4 1991) (noting split and declining to reaffirm *Pinar* v. *Dole*, 747 F.2d 899, 910 (CA4 1984), "[b]ecause of the weight and difficulty of the issue and our affirmance on other grounds"); *Hardison* v. *Cohen*, 375 F.3d 1262, 1267 (CA11 2004) (noting divergence of authority within circuit and distinguishing *Stephens* v. *Dep't of Health & Hum. Svcs.*, 901 F.2d 1571, 1575-76 (CA11 1990), which denied equitable relief, observing the *Stephens* court's failure to directly address the distinction between legal and

that federal courts retain their authority to enjoin unconstitutional government actions notwithstanding the CSRA's preclusion of constitutional claims for money damages. See *Mitchum* v. *Hurt*, 73 F.3d 30, 35-36 (CA3 1995); *Hubbard* v. *EPA*, 809 F.2d 1, 11-12 (CADC 1986). This circuit conflict has been repeatedly recognized. See, *e.g.*, *Hubbard*, 809 F.2d at 11 n.15 ("[T]he rule in this Circuit, which has been repeatedly applied, is clearly different [from that of the Fourth Circuit in *Pinar*]."); *Hardison* v. *Cohen*, 375 F.3d 1262, 1267 (CA11 2004) ("Several of our sister circuits have differed on whether equitable relief is precluded by the presence of a statutory remedial scheme."); *Tiltti* v. *Weise*, 155 F.3d 596, 602 (CA2 1998); *Paige* v. *Cisneros*, 91 F.3d 40, 44 (CA7 1996); *Bryant* v. *Cheney*, 924 F.2d 525, 528 (CA4 1991).

1. In *Hubbard*, a suit for reinstatement by an EPA employee, the D.C. Circuit reasoned that federal courts were empowered to grant equitable relief on constitutional claims in work-related suits by federal employees on two grounds. First, "[b]ecause 5 U.S.C. § 702 (1982) waives sovereign immunity from suits not seeking money damages, federal courts have jurisdiction to grant equitable relief to remedy agency violations of constitutional rights." *Hubbard*, 809 F.2d at 11. Second, the *Hubbard* court cited the "presumed availability of federal equitable relief against threatened invasions of constitutional interests." *Ibid.* (quoting *Bivens* v.

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equitable remedies). *Hardison* may also suggest a third rule, in between that of the Ninth and Tenth Circuits and that of the Third and D.C. Circuits, which would allow equitable relief if and only if no administrative procedure availed. See *Hardison*, 375 F.3d at 1267 ("Had the *Stephens* plaintiff been left without a remedy, it is not clear that this Court would have found that his equitable claim was barred."). District courts in the Seventh and Eighth Circuits have agreed with the rule of the Ninth and Tenth Circuits. See *Massey* v. *Helman*, 35 F. Supp. 2d 1110, 1116 (C.D. Ill. 1999); *Barhorst* v. *Marsh*, 765 F. Supp. 995, 998 (E.D. Mo. 1991).

Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 404 (1971) (Harlan, J., concurring)).

The D.C. Circuit rejected the Fourth Circuit's view that the availability of equitable relief for constitutional claims would allow employees to do an "end run" around CSRA procedures, explaining that although *Bivens* actions are a recent creation and "comparatively easy for Congress to preempt," "[t]he court's power to enjoin unconstitutional acts by the government * * * is inherent in the Constitution itself." *Id.* at 11 n.15 (citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)). The CSRA does not preempt constitutional claims seeking equitable relief, the court held, because the statute does not "explicitly limit our jurisdiction to enjoin unconstitutional personnel actions by federal agencies." *Ibid.* The court also distinguished this Court's holding in *Bush* v. *Lucas*, 462 U.S. 367, 390 (1983), that judicial awards of money damages are unavailable for claims covered by the CSRA, as "only preclud[ing] damage claims against individuals, not equitable claims against agencies." 809 F.2d at 11.

The D.C. Circuit consolidated *Hubbard* with another case to consider the *Bivens* issue en banc. See *Spagnola* v. *Mathis*, 859 F.2d 223 (CADC 1988) (per curiam). After affirming the panel's ruling that suits for money damages were precluded, the unanimous per curiam opinion explicitly indicated that – contrary to the holdings of some other circuits – the CSRA did not preclude constitutional claims seeking equitable relief. See *id.* at 229-30 ("[T]ime and again this court has affirmed the right of civil servants to seek equitable relief * * * in vindication of their constitutional rights.") (citing, *inter alia*, *Hubbard*).

The Third Circuit has adopted the same rule. In *Mitchum*, that court allowed a suit brought by Veterans Administration employees for injunctive and declaratory relief. The Third Circuit acknowledged the contrary view of other circuits but nonetheless adopted the reasoning of the

D.C. Circuit in *Hubbard* and *Spagnola*. 73 F.3d at 35. Citing the presumption in favor of the availability of equitable relief, the court emphasized that "Congress legislates with the understanding that this form of judicial relief is generally available to protect constitutional rights." *Ibid.* Like the D.C. Circuit, the Third Circuit read *Bush* narrowly, expressing "hesitan[ce] to extend [*Bivens*] jurisprudence into other spheres. Just because 'special factors counseling hesitation' militate against the creation of a new non-statutory damages remedy, it does not necessarily follow that the long-recognized availability of injunctive relief should be restricted as well." *Ibid.*

2. By contrast, as discussed *supra*, the Ninth Circuit rule is that constitutional claims in equity enjoy no special status. The Ninth Circuit's failure to expressly address below the distinction between equitable claims such as petitioner's and claims for money damages was no mere oversight. Rather, the well-established Ninth Circuit rule is that "[f]ederal courts 'have *no power* to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere.'" Pet. App. 7a (quoting *Veit* v. *Heckler*, 746 F.2d 508, 511 (CA9 1984) and citing *Blue* v. *Widnall*, 162 F.3d 541, 545 (CA9 1998)). Likewise, the Tenth Circuit in *Lombardi* rejected any distinction between money damages and equitable relief for purposes of determining CSRA preclusion. See *Lombardi*, 889 F.2d at 962 ("[J]udicial intervention is disfavored whether it is accomplished by the creation of a damages remedy or injunctive relief.") (citing *Weatherford* v. *Dole*, 763 F.2d 392 (CA10 1985)). The court believed that the CSRA, along with *Schweiker* v. *Chilicky*, 487 U.S. 412, 421-22 (1988) (expressing reluctance to extend *Bivens* remedies to new areas), "virtually prohibit intrusion by the Courts into the statutory scheme established by Congress." *Lombardi*, 889 F.2d at 961-62.

The Ninth Circuit in *Saul* similarly held – without specifically examining the reasons for distinguishing the two

types of relief – that "judicial interference in federal employment is disfavored, whether the employee requests damages or equitable relief." *Saul*, 928 F.2d at 843. And in the decision below in this case, the Ninth Circuit simply applied its longstanding CSRA preemption doctrine and failed even to mention in its discussion that petitioner seeks only equitable relief. See Pet. App. 7a-8a.

3. Although the circuits have long recognized the split on this issue, they show no inclination to resolve it; rather, their conflicting precedents continue to grow more entrenched. Indeed, some circuits have specifically lamented the lack of clear guidance from this Court. See *Mitchum*, 73 F.3d at 36 (concluding that "[w]ithout more specific guidance from the Supreme Court, we do not think that [precluding equitable relief] is a jump that we should make"); *Hardison*, 375 F.3d at 1266 ("The Supreme Court has not addressed directly the issue * * *."); *Bryant*, 924 F.2d at 528 n.2 ("Resolution of this issue is made more difficult by a distinction the Supreme Court seems to have drawn between *Bivens* actions for damages and equitable claims for injunctive or declaratory relief. The former are precluded by CSRA notwithstanding that they are by definition 'constitutional' claims.") (citing *Bush*).

Such a conflict is untenable. In circuits that interpret the CSRA to preclude constitutional claims for equitable relief, federal employees may in some cases be left without any vehicle for asserting their constitutional rights against federal agencies, except for the administrative process conducted within the agency. See Elizabeth A. Wells, Note, *Injunctive Relief for Constitutional Violations: Does the Civil Service Reform Act Preclude Equitable Remedies?*, 90 MICH. L. REV. 2612, 2645 (1992) (warning that gaps in CSRA procedures leave "specific classes of federal employees without constitutional protections") (cited in *Hardison*, 375 F.3d at 1267).

In addition, the conflict implicates a central element of separation of powers – the judicial review of executive branch actions. The courts that have permitted equitable claims have noted the traditional reluctance with which courts cede that power and the express command from Congress that is required before they do so. See, *e.g.*, *Hubbard*, 809 F.2d at 11 n.15; *Hardison*, 375 F.3d at 1267 ("Denying federal courts 'the power to review the sufficiency of legislative schemes' and provide equitable relief violates the separation of powers, because the courts are unable to serve 'as a check on other branches of government.'") (quoting Wells, *supra*, at 2642); cf. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 975-76 (1988).

B. The CSRA Does Not Preclude Courts from Granting Equitable Relief for Constitutional Violations.

Even if the Ninth Circuit's opinion construing Section 7121(a)(1) to preclude federal court jurisdiction over grievances covered by a federal employee's CBA is correct, certiorari is nonetheless warranted because the Ninth Circuit's rule that the CSRA precludes courts from granting federal employees equitable relief for constitutional violations is wrong on the merits. As both the Third and D.C. Circuits recognize, courts should not infer a congressional intent to foreclose injunctive remedies for constitutional violations unless Congress has made that intent unmistakably clear. Further, because the Ninth Circuit's construction of the CSRA would have the effect of stripping *all* courts of jurisdiction to review constitutional violations by federal agencies, it should be rejected so as to avoid serious constitutional questions.

1. This Court held in *Bush* v. *Lucas*, 462 U.S. 367 (1983), that a federal employee's action for money damages for violation of a constitutional right under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403

U.S. 388 (1971), is precluded by the CSRA. *Bush*, 462 U.S. at 389. Both the Ninth and Tenth Circuits have relied upon *Bush* and *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), to hold that the CSRA precludes not only constitutional claims for money damages but also claims for equitable relief, a question that neither *Bush* nor *Chilicky* addressed. See *Saul*, 928 F.2d at 843 ("[J]udicial interference in federal employment is disfavored, whether the employee requests damages or injunctive relief."); *Lombardi*, 889 F.2d at 961-62 ("T]he clear purpose of *Chilicky*[, *Bush*, and] related cases is to virtually prohibit intrusion by the Courts into the statutory scheme established by Congress. This judicial intervention is disfavored whether it is accomplished by the creation of a damages remedy or injunctive relief."). These courts, however, fail to recognize the distinction between a damages remedy under *Bivens* and equitable relief.

Applying the rationale of *Bivens* to claims seeking injunctive relief from federal agencies for constitutional violations is misguided. Because "*Bivens* actions are a recent judicial creation and * * * comparatively easy for Congress to preempt," *Hubbard*, 809 F.2d at 11 n.15, this Court has shown "caution toward extending *Bivens* remedies into any new contexts," *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001). On the other hand, "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution," *Bell* v. *Hood*, 327 U.S. 678, 684 (1946), a practice that goes back two centuries. See, *e.g.*, *Ex Parte Young*, 209 U.S. 123, 156-57 (1908); *Pennoyer* v. *McConnaughy*, 140 U.S. 1, 10 (1891); *Osborn* v. *United States Bank*, 22 U.S. (9 Wheat.) 738, 843, 868 (1824). This long history has established a "presumed availability of federal equitable relief against threatened invasions of constitutional interests." *Bivens*, 403 U.S. at 404 (Harlan, J., concurring); see also *Mount Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 283-84 (1977); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). Although Congress may limit the courts'

power to enjoin unconstitutional acts by the government, cf. *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), "[i]t is reasonable to assume that Congress legislates with the understanding that this form of judicial relief is generally available to protect constitutional rights," *Mitchum*, 73 F.3d at 35. Even in the case of remedies for violations of statutory rights, this Court has held that "major departure from the long tradition of equity practice should not be lightly implied." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 320 (1982) (citing *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944)). When substantive rights underlying the prayer for equitable relief derive from the Constitution, courts should be even more reluctant to find congressional intent to take the extraordinary step of denying judicial equitable powers unless Congress's intent to do so is unmistakably clear.

Such a clear statement from Congress should be required because depriving the courts of equitable power to remedy constitutional violations would undermine the balance of power between the federal courts and executive agencies. As noted above, courts of equity have historically provided a crucial check against executive encroachment upon constitutional rights. This Court's precedent suggests that Congress must make its intention to shift the balance of power inherent in the constitutional structure unmistakably clear. This Court has demanded a clear statement before ratifying congressional attempts to change the constitutional balance of power in other areas. For example, in the federalism context, this Court held that Congress cannot upset the "constitutionally mandated balance of power," *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)), by abrogating the states' sovereign immunity without "making its intention unmistakably clear in the language of the statute," *ibid.*; see also *id.* at 243 ("[I]t is incumbent upon the federal courts to be certain of Congress's intent before finding that federal law overrides the guarantees of the Eleventh Amendment. The

requirement that Congress unequivocally express this intention in the statutory language ensures such certainty."). Similarly, this Court has held that it "must be absolutely certain that Congress intended" to exercise its Commerce Clause authority to regulate state functions before recognizing such intent. *Gregory* v. *Ashcroft*, 501 U.S. 452, 464 (1991). Further, this Court has announced similar "clear statement" requirements when evaluating congressional attempts to affect the balance of power between the federal legislative and executive branches through broad delegations of authority to administrative agencies. See, *e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (noting that the FDA's attempt to regulate tobacco products under the authority granted by the Food, Drug, and Cosmetics Act to regulate "drugs" was an "expansive construction of the statute" that implicated a decision of large "economic and political significance," and therefore holding that "Congress could not have intended to delegate" such a decision "in so cryptic a fashion"). The principle announced by this Court's jurisprudence thus suggests that a congressional attempt to shift the balance of power between the executive and judicial branches by stripping the courts of power to enjoin constitutional violations by federal agencies should not be recognized merely by implication, but rather by statutory language representing unequivocally clear congressional intent.

2. A clear statement from Congress that the CSRA precludes equitable relief for constitutional claims should also be required because such a rule would broadly preclude initial judicial review of constitutional claims by federal employees against their employers. Because this Court held in *Bush* that the CSRA precludes *Bivens* claims for actions covered by the statute, courts' equitable powers represent the only possible avenue for them to review constitutional claims by federal employees that stem from actions covered by the CSRA. Thus, the Ninth Circuit's rule precluding equitable relief for claims covered by the CSRA has the effect of stripping

federal and state courts of the power to review any such constitutional claims.

Although this Court has never squarely addressed the constitutionality of a congressional attempt to strip all courts of jurisdiction to review constitutional claims, see RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 347 (5th ed. 2003), it has on numerous occasions construed statutes to permit judicial review of constitutional claims, thus avoiding "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim," *Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (quoting *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (in turn quoting *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975)); see also *Johnson* v. *Robison*, 415 U.S. 361, 366-67 (1974). If "Congress intend[ed] to preclude judicial review of constitutional claims" through the CSRA, "its intent to do so must be clear." *Webster*, 486 U.S. at 603. Because Congress did not make clear its intent to preclude all review of constitutional claims through the CSRA, this Court should reject the Ninth Circuit's rule and allow federal courts of equity to remedy constitutional violations by federal agencies against their employees arising from actions covered by the CSRA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Pamela S. Karlan
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
Goldstein & Howe, P.C.
4607 Asbury Place, N.W.
Washington, DC 20016
(202) 237-7543

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[8] Counsel for petitioner were principally assisted by the following members of the Harvard Law School Supreme Court Litigation class: Christopher Houpt and Anton Metlitsky. Class members Mark Conrad, Jeffrey Harris, Elissa Hart, Gregory Reilly, Won Shin, Alixandra Smith, Sharmila Sohoni, and Neel Sukhatme also participated.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-35303

TERRY L. WHITMAN,
PLAINTIFF-APPELLANT,

v.

DEPARTMENT OF TRANSPORTATION; NORMAN Y. MINETA,
U.S. SECRETARY OF TRANSPORTATION,
DEFENDANT-APPELLEES.

Appeal from the United States District Court
for the District of Alaska

Submitted July 7, 2004*
Anchorage, Alaska

Filed August 30, 2004

Before: HALL, KLEINFELD, and WARDLAW, Circuit Judges.

WARDLAW, Circuit Judge:

Terry L. Whitman claims that his employer, the Federal Aviation Administration ("FAA"), an agency within the United States Department of Transportation ("DOT"), violated his rights under 49 U.S.C. § 45104(8) and the First Amendment by disproportionately testing him for substance abuse. Concluding that (i) the Civil Service Reform Act ("CSRA"), 5 U.S.C. § 7101 et seq., governs Whitman's

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* The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

employment grievance against the FAA; (ii) the CSRA does not expressly confer federal court jurisdiction over such claims; and (iii) Whitman's sole remedy lies with the negotiated grievance procedures set forth in the collective bargaining agreement ("CBA") between the FAA and the National Association of Government Employees ("NAGE"), the district court dismissed Whitman's action. We affirm[1] because 5 U.S.C. § 7121(a)(1), as amended in 1994, does not expressly confer federal court jurisdiction over employment-related claims covered by the negotiated grievance procedures of federal employees' collective bargaining agreements. *See Golt v. United States*, 186 F.3d 1158, 1164 (9th Cir. 1999).

I

Federal law mandates random substance-abuse tests for FAA employees "whose duties include responsibility for safety-sensitive functions." 49 U.S.C. § 45102(b)(1). Employee selection for such testing must be accomplished by "nondiscriminatory and impartial methods." *Id.* § 45104(8). Whitman is employed by the FAA as an air traffic assistant at the Anchorage Air Route Traffic Control Center. DOT regulations specifically require drug and alcohol testing of FAA air traffic assistants.[2] DOT and FAA regulations provide detailed requirements for the random selection of employees for such testing.[3]

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[1] We review de novo the district court's dismissal for lack of subject matter jurisdiction. *See Orsay v. United States Dep't of Justice*, 289 F.3d 1125, 1128 (9th Cir. 2002).

[2] *See* Dep't of Transp., Drug and Alcohol-Free Departmental Workplace, Order No. 3910.1C app. at 5 (Dec. 28, 1994), *available at* http:// www.faa.gov/avr/aam/isap/3910_1c.pdf [hereinafter "DOT Order"].

[3] *See* DOT Order at IV-1 to IV-2; Fed. Aviation Admin., Site Coordinators Handbook: Drug and Alcohol Testing Program §§ II.A-B, IV.A-B, *available at* http://www.faa.gov/avr/aam/isap/cover.pdf.

Because Whitman believed that he had been selected for testing three times more often than similarly situated employees, he filed with the Federal Labor Relations Agency ("FLRA") a charge against the FAA, alleging that its drug and alcohol testing program "does not guarantee individual rights and the randomness of the selection process is suspect." The FLRA responded that Whitman's claim was not within its jurisdiction because he had not alleged that the disproportionate testing was "discrimination against him based on protected union activity." It further explained that the substance-abuse testing program was a condition of Whitman's employment, the terms of which were established by the CBA. The FLRA concluded "that [Whitman's] recourse is through the grievance procedures of the negotiated agreement." It denied Whitman's request for reconsideration. Although Whitman does not dispute CBA coverage, he has never initiated the grievance procedures of that agreement. Instead, Whitman filed an amended complaint in the district court, alleging that his employer's misapplication of the DOT/FAA random substance-abuse testing procedures violated his rights under 49 U.S.C. § 5331(d)(8) (now codified at 49 U.S.C. § 45104(8)), as well as his "First Amendment right to privacy." He requested injunctive relief in the form of an order requiring a survey of other employees to determine how often they were tested and, if the survey were to establish that testing was not random, that the FAA "remedy the situation" by, for example, enjoining any further testing of him until similarly situated employees were tested as often as he.

Quoting *Veit v. Heckler*, 746 F.2d 508, 511 (9th Cir. 1984), the district court dismissed Whitman's action for lack of subject matter jurisdiction because his claims fall within the scope of the CSRA, under which "federal courts have no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere." Whitman's appropriate and sole remedy, as recognized in the CSRA, was to grieve his

allegations pursuant to the CBA procedures, and his failure to do so precluded judicial review. Finally, the district court found the CSRA procedures also preempted Whitman's constitutional claim. *See Russell v. United States Dep't of the Army*, 191 F.3d 1016, 1020 (9th Cir. 1999) ("The CSRA preempts *Bivens* actions and other suits for constitutional violations arising from governmental personnel actions.").

II

A

Although the government argued, and the district court apparently agreed, that Whitman's employment rights are governed by the CSRA, the government now clarifies that it is actually the FAA Personnel Management System ("FAA System") that governs the employment rights of FAA employees.[4] The FAA System incorporates certain relevant provisions of the CSRA through a series of laws enacted by Congress in 1996. *See* 49 U.S.C. § 40122(g)(2). Congress also made other CSRA provisions inapplicable to FAA employees and directed the FAA to develop a unique system of regulations to fill in the gaps, *see id.* § 40122(g)(1), thus establishing a "single unified personnel policy" for FAA employees. *Saul v. United States*, 928 F.2d 829, 833 (9th Cir. 1991) (discussing the CSRA).

Like the CSRA, the FAA System is "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States v. Fausto*, 484 U.S. 439, 445 (1988) (describing the CSRA). While the FAA System generally does not give employees the right to seek review of personnel matters in district court, like the CSRA, it expressly preserves employees' rights under various anti-discrimination laws to sue in district court after exhaustion of administrative remedies. *See* FAA System, Introduction § VIII(b)(ii)

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[4] The FAA System is available at http://www.faa.gov/ahr/policy/PMS/Pmshom2.htm.

(recognizing FAA employees' rights to sue under the Civil Rights Act , the Age Discrimination in Employment Act, the Fair Labor Standards Act, and the Rehabilitation Act, among others).

The FAA System incorporates Chapter 71 of title 5, United States Code § 7101 et seq., which governs review of grievances by employees who are subject to a negotiated collective bargaining agreement. *See* 49 U.S.C. § 40122(g)(2)(C). Therefore, despite the direct reference to the CSRA, the district court actually applied the correct law in deciding the government's motion to dismiss for lack of subject matter jurisdiction. *See, e.g.*, *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002) (analyzing whether federal courts have jurisdiction under the CSRA over an FAA employee's employment-related claims).

B

The CSRA broadly defines "grievance" to include an employee's complaint "concerning any matter relating to the employment of the employee" and "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9)(A); *id.* § 7103(a)(9)(C)(ii). So defined, the term encompasses Whitman's allegations that the FAA tested him for substance abuse disproportionately, in violation of his rights under 49 U.S.C. § 45104(8) and the First Amendment.

The CSRA requires that collective bargaining agreements provide negotiated procedures for the resolution of employee grievances. Section 7121(a)(1) states:

> Any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, [none of which applies in this case] the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

In accordance with this requirement, and as the FLRA informed Whitman, CBA Article 13 provides a

comprehensive administrative process for redress of his grievance concerning his drug and alcohol testing.[5]

The issue before us is whether Whitman may also pursue his employment-related claims in federal court.

III

A

Before the 1994 amendment, CSRA § 7121(a)(1) provided that the required grievance procedures in a collective bargaining agreement "shall be the exclusive procedures for resolving grievances which fall within its coverage." In 1994, without explanation, Congress amended the statute to read that the required grievance procedures "shall be the exclusive administrative procedures for resolving grievances which fall within its coverage." 5 U.S.C. § 7121(a) (emphasis added).

Interpreting this amendment, the Federal and Eleventh Circuits recently held that "Congress's addition of the word 'administrative' to § 7121(a)(1) established a federal employee's right to seek a judicial remedy for employment grievances subject to the negotiated procedures contained in his or her CBA." *Mudge*, 308 F.3d at 1227; *see also Asociacion de Empleados del Area Canalera v. Pan. Canal Comm'n*, 329 F.3d 1235, 1241 (11th Cir. 2003) (adopting *Mudge*'s reasoning in full). The Federal Circuit interpreted the statute's text:

> The plain language of § 7121(a)(1) as amended is . . . clear: while § 7121(a)(1) limits the administrative resolution of a federal employee's grievances to the negotiated procedures set forth in his or her CBA, the text of the statute does not restrict an employee's right to seek a judicial remedy for such grievances.
>
> . . . .

[5] The NAGE term agreement relevant to Whitman's case is dated May 26, 1998. It is *available at* http://www.faa.gov/ahr/policy/agree/agrees/ term/nage/nage.cfm.

> . . . The plain language of amended § 7121(a)(1), which provides that the negotiated procedures contained in a CBA are to be the "exclusive administrative procedures for resolving grievances which fall within its coverage," does not limit a federal employee's right to avail him or herself of alternative, non-administrative avenues of redress.

Mudge, 308 F.3d at 1228, 1230 (emphasis in original). Thus, the Federal Circuit held that its prior cases, which limited resolution of federal employee grievances exclusively to the negotiated grievance procedures set forth in the employee's collective bargaining agreement, were no longer applicable because those cases were based upon the pre-amendment version of § 7121(a)(1). *Id.* at 1228.

We have no precedent comparable to *Mudge* or *ASEDAC*. In fact, as the district court correctly recognized, our well-established rule is to the contrary: Federal courts "have no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere." *Veit*, 746 F.2d at 511; *accord Blue v. Widnall*, 162 F.3d 541, 545 (9th Cir. 1998) (quoting *Veit*). Thus, "under the law of this circuit, 5 U.S.C. § 7121(a)(1) preempts employment related claims which fall within collective bargaining agreements" because the statute does not expressly provide for federal court jurisdiction over such claims. *Golt*, 186 F.3d at 1159 (applying post-amendment § 7121(a)(1)).

Although we have never expressly addressed what effect, if any, the 1994 amendment to § 7121(a)(1) had on federal court jurisdiction over federal employee grievances, we implicitly rejected the reasoning of *Mudge* and *ASEDAC* in *Golt*. There, the wife of a deceased former employee of the Army Air Force Exchange Service ("AAFES") brought suit in district court alleging that AAFES had wrongly terminated her husband's employment, in violation of his rights under the Federal Tort Claims Act ("FTCA") and the Constitution. Because neither Golt nor his wife had ever initiated the

grievance process provided in Golt's collective bargaining agreement, the district court dismissed the action for failure to state a claim upon which it could grant relief. Fed. R. Civ. P. 12(b)(6). On appeal, Golt's wife argued that the AAFES should be precluded "from obtaining the benefits of CSRA preemption" because it had failed under the CSRA to give proper notice to its employees that they could request union representation in certain employment proceedings. 186 F.3d at 1164. We rejected the argument. After recognizing that amended § 7121(a)(1) limited an employee of a federal agency "to the grievance procedures in the collective bargaining agreement negotiated with his or her employer in resolving grievances that may result in disciplinary action," 186 F.3d at 1161, we explained:

> Mrs. Golt has not cited any authority to support her contention that we may ignore the express language of a federal statute [i.e., § 7121(a)(1)] that provides the exclusive remedy for a party who seeks relief from an alleged deprivation of his or her rights. While it is true that § 7114(a)(2)(B) of the CSRA requires a federal employer to give its employees annual notice of their right to request union representation at an examination that may result in disciplinary action, the statute does not provide that an employer's failure to do so authorizes an employee to invoke a discrete remedy under the FTCA, or pursuant to federal common law [*i.e.*, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)]. We have no constitutional grant of authority to amend the CSRA to invent such an exception to its application. Only Congress has that power.

186 F.3d at 1164.

Because the addition of the word "administrative" to the statute does not constitute an express grant of federal court jurisdiction, *Golt* correctly held that amended § 7121(a)(1) establishes no more than an exclusive administrative remedy. In contrast, the Federal and Eleventh

Circuits hold that amended § 7121(a)(1) implicitly authorizes federal court jurisdiction because the statute "does not limit a federal employee's right to avail him or herself of alternative, non-administrative avenues of redress." *Mudge*, 308 F.3d at 1230; *see also ASEDAC*, 329 F.3d at 1241 ("We hold that Congress' addition of the word 'administrative' to § 7121(a)(1) established a federal employee's right to seek a judicial remedy for employment grievances subject to the negotiated grievance procedures contained in his or her collective bargaining agreement."). The *Mudge*/*ASEDAC* implicit-authorization approach is inconsistent with the law of our circuit, *see Russell*, 191 F.3d at 1019-20; *Blue*, 162 F.3d at 545; *Veit*, 746 F.2d at 511, and with principles the Supreme Court has approved. For example, in *Karahalios v. Nat'l Fed'n of Fed. Employees*, 489 U.S. 527, 536-37 (1989), the Court affirmed our decision rejecting a claim that CSRA § 7101 et seq. impliedly authorized federal court jurisdiction over a suit against the union for breach of its duty of fair representation. The Court explained: "Just as in *United States v. Fausto*, we held that the CSRA's 'integrated scheme of administrative and judicial review' foreclosed an implied right to Court of Claims review, we follow a similar course here." *Karahalios*, 489 U.S. at 536 (citations omitted).[6] We

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[6] In addition, our approach is more consistent with the well-established rule that federal courts are courts of limited jurisdiction. As the Supreme Court has recognized: "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). Indeed, "it remains rudimentary law that 'as regards all courts of the United States inferior to [the Supreme Court], two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. . . . To the extent that such action is

therefore make explicit *Golt*'s assumption that CSRA § 7121(a)(1) does not confer federal court jurisdiction over statutory and constitutional claims concerning employment-related matters within the scope of the negotiated grievance procedures of a federal employee's collective bargaining agreement, and we hold that Congress's 1994 addition of the word "administrative" to the statute does not constitute an express grant of federal court jurisdiction over such claims.

B

Whitman also argues that his complaint of disproportionate drug and alcohol testing should not be viewed as an "employee grievance" but instead as a "prohibited personnel practice" in violation of the FAA's "merit system principles," which require that FAA employees be protected from arbitrary action and provided fair treatment in all aspects of personnel management, with proper regard for their privacy and constitutional rights. *See* FAA System, Introduction § § VII, VIII. Assuming Whitman's allegations state a "prohibited personnel practice," he was required under the CSRA to pursue corrective action through the Office of Special Counsel ("OSC"). *See* 5 U.S.C. §§ 1211-1218 (OSC review); id. § § 2301-2302 (prohibited personnel practices); 49 U.S.C. § 40122(g)(2)(H) (making CSRA provisions concerning OSC investigation of prohibited personnel practices applicable to the FAA). These exclusive administrative remedies preclude judicial review of Whitman's claimed "prohibited personnel practice." *See Orsay*, 289 F.3d at 1128-29. Although Whitman argues that he was unable to pursue such relief because the FAA is immune from OSC investigation, his argument is belied by 49 U.S.C. § 40122(g)(2)(H), which extends the CSRA's provisions for OSC investigation of prohibited personnel practices to the FAA System.

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not taken, the power lies dormant.'" *Finley v. United States*, 490 U.S. 545, 547-48 (1989) (quoting *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252 (1868)) (emphasis added in *Finley*).

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For the foregoing reasons, the district court's dismissal for lack of subject matter jurisdiction is AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A02-0112 CV (RRB)

TERRY L. WHITMAN,
PLAINTIFF

v.

DEPARTMENT OF TRANSPORTATION; THE HON. NORMAN Y. MINETA, U.S. SECRETARY OF TRANSPORTATION,
DEFENDANT

Order Granting Defendants' Motion to Dismiss Complaint and Amended Complaint

I. Introduction

Before the Court is Defendant United States Department of Transportation (the "Government") with a Motion to Dismiss the Complaint and the Amended Complaint.[1] The Government asks this Court to dismiss the case for lack of [subject matter] jurisdiction."[2] Plaintiff Terry L. Whitman ("Whitman"), a federal employee for the Federal Aviation Administration ("FAA"), opposed and contends he has no other choice but to bring this action before this Court.[3] Having carefully considered the pleadings and the relevant law, Defendant's Motion to Dismiss the Complaint and the Amended Complaint is hereby GRANTED.

II. Facts

On or about June 4, 2001, Whitman filed a claim with the Federal Labor Relations Authority ("FLRA").[4] In essence, Whitman argued that "the FAA violated his rights

[1] Docket No. 13.

[2] Docket No. 13 at 11.

[3] Docket No. 14 at 7.

[4] Docket No. 14 at 3.

under [a] Union agreement by subjecting him to a disproportionate number of drug and alcohol tests."[5] The FLRA denied the claim and stated the issue(s) raised by Whitman did not involve rights under the Federal Service Labor-Management Relations Statutes, "that are within the jurisdiction of the FLRA."[6] The FLRA further advised, "it appears that your recourse is through the grievance procedures of the negotiated agreement [between the FAA and the National Association of Government Employees ("NAGE")]."[7] Whitman appealed. His appeal was denied "by [the] FLRA in a ruling dated September 24, 2001."[8]

"On October 5, 2001, [and following another drug test, Whitman] filed a Motion for Reconsideration. . . ."[9] It too was denied by the FLRA.

III. Standard of Review

In the absence of subject matter jurisdiction, dismissal is the appropriate disposition.[10]

IV. Discussion

"The preliminary issue in this case is whether a [FAA] employee may challenge government employment actions or practices in the federal courts."[11]

Whitman's rights "are governed by the Civil Service Reform Act ("CSRA").[12] "The CSRA provides a comprehensive scheme for administrative and judicial review of federal personnel actions and practices."[13] As a result, this

[5] Docket No. 13 at 4 (citation omitted).

[6] Docket No. 13, Ex. A at 2.

[7] Docket No. 13.

[8] Docket No. 14 at 3.

[9] Docket No. 14.

[10] *MacKay v. Pfiel*, 827 F.2d 540, 543 (9th Cir. 1987).

[11] *Veit v. Heckler*, 746 F.2d 508, 509 (9th Cir. 1984).

[12] Docket No. 13 at 6 (*citing* 5 U.S.C. § 1101 et seq.) (footnote omitted).

[13] *Veit*, 746 F.2d at 510.

Court has "no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere."[14]

Because the CSRA acknowledges grievance procedures provided through union agreements,[15] and because "Whitman has a remedy through the negotiated agreement between the FAA and the NAGE union,"[16] the Court concludes Whitman should have *grieved* his allegation(s). Because he chose not to do so, this Court cannot provide him with a judicial remedy.[17] Where a remedy is not provided by the CSRA, the Court cannot provide one.[18]

With regard to any and/or all remaining constitutional claims, the Court lacks jurisdiction to review the same.[19]

V. Conclusion

For the reasons stated herein, the Court concludes: "neither the CSRA, the [Administrative Procedure Act] nor any other authority gives it the power to review" Whitman's claim(s) against his employer.[20] As a result, the case is DISMISSED for lack of subject matter jurisdiction.

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[14] *Id.* at 511.

[15] *Saul v. U.S.*, 928 F.2d 829, 834-35 (9th Cir. 1991).

[16] Docket No. 13 at 7.

[17] *Veit*, 746 F.2d at 511 ("Where established procedures provide for hearings and appeals in employment matters, an employee who does not avail himself of those procedures in a timely manner fails to exhaust his administrative remedies and is therefore precluded from seeking judicial review.") (citation omitted).

[18] *Id.*

[19] "[T]he CSRA preempts *Bivens* actions *and* other suits for constitutional violations arising from governmental personnel actions." *Russell v. United States Department of the Army*, 191 F.3d 1016, 1020 (9th Cir. 1999).

[20] *Veit*, 746 F.2d at 511 (9th Cir. 1984).

ENTERED at Anchorage, Alaska, this 25 day of February, 2003.

/s/ Ralph R. Beistline
RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-35303

TERRY L. WHITMAN,
PLAINTIFF-APPELLANT

V.

DEPARTMENT OF TRANSPORTATION; ET AL..
DEFENDANT-APPELLEES.

Filed November 24, 2004

Before: HALL, KLEINFELD, and WARDLAW, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.